87-775

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED FAMILIES OF AMERICA,
Appellant,

v.

CHAN KENDRICK, *et al.*

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

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November 10, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether Congress may involve religiously-affiliated organizations, "as appropriate," along with other charitable organizations, voluntary associations, and private sector groups, in a grant program designed to support projects to discourage adolescent pregnancy and to provide care for pregnant adolescents. See the Adolescent Family Life Act, 42 U.S.C. (& Supp. III) 300z *et seq.*

2. Whether the district court erred in excluding from participation in the program all religiously-affiliated organizations, including organizations that are not "pervasively sectarian" under this Court's definition.

3. Whether the district court erred in excluding religiously-affiliated organizations from participating in social welfare aspects of the program not directly related to education or counseling.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Otis R. Bowen, Secretary of Health and Human Services, was defendant in the district court; Sammie J. Bradley and Katherine K. Warner were defendant-intervenors in the district court; and Reverend Robert E. Vaughn, Reverend Lawrence W. Buxton, Dr. Emmett W. Cocke, Jr., Shirley Pedler, Reverend Homer A. Goddard, Joyce Armstrong, John Roberts, and the American Jewish Congress were plaintiffs in the district court.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The April 15, 1987 opinion of the district court is reported at 657 F.Supp. 1547 (D.D.C. 1987). It is reproduced as Appendix A to the Jurisdictional Statement in No. 87-431 (U.S. J.S. App. 1a-46a). The August 13, 1987 final judgment of the district court is unreported. It is reproduced as Appendix D to the Jurisdictional Statement in No. 87-431 (U.S. J.S. App. 52a-55a).

JURISDICTION

On April 15, 1987, the district court entered an interlocutory opinion and order, holding that the Adolescent Family Life Act, 42 U.S.C. (& Supp. III) 300z *et seq.* (the "AFLA"), is unconstitutional on its face and as

applied *"insofar as religious organizations are involved in carrying out the programs and purposes of the Act"* (U.S. J.S. App. 2a n.2 (emphasis in original)). The district court issued a final order and opinion on August 13, 1987, incorporating the April 15 opinion, severing the term "religious organizations" from the AFLA "in all places that it appears," and permitting continued AFLA funding to non-religious organizations (U.S. J.S. App. 52a-55a). This order also dismissed the case from the district court's docket.

On September 11, 1987, United Families of America filed a notice of appeal from the court's final judgment of August 13, 1987 (App. B, *infra*). This Court has jurisdiction pursuant to 28 U.S.C. 1252 (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

U.S. Const. amend. I.

The Congress finds that—

* * * *

(8) (B) such problems are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives;

* * * *

(10) (C) services encouraged by the Federal Government should promote the involvement of parents

with their adolescent children, and should emphasize the provision of support by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector in order to help adolescents and their families deal with complex issues of adolescent premarital sexual relations and the consequences of such relations;

42 U.S.C. 300z(a)(8)(B), 300z(a)(10)(C).

(a) The Secretary may make grants to further the purposes of this subchapter to eligible grant recipients which have submitted an application which the Secretary finds meets the requirements of section 300z-5 of this title for demonstration projects which the Secretary determines will help communities provide appropriate care and prevention services in easily accessible locations. Demonstration projects shall, as appropriate, provide, supplement, or improve the quality of such services. Demonstration projects shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems, such as other family members, friends, religious and charitable organizations, and voluntary associations.

42 U.S.C. 300z-2(a).

(a) An application for a grant for a demonstration project for services under this subchapter shall be in such form and contain such information as the Secretary may require, and shall include— . . .

(21) a description of how the applicant will, as appropriate in the provision of services— . . .

(B) involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives;

42 U.S.C. 300z-5(a)(21)(B).

STATEMENT OF THE CASE

1. In 1981, Congress enacted the Adolescent Family Life Act ("AFLA") as Title XX to the Public Health Service Act, Pub.L.No. 97-35, 95 Stat. 578 (1981).[1] The AFLA was enacted in response to Congress's finding that "in 1978, an estimated one million one hundred thousand teenagers became pregnant, more than five hundred thousand teenagers carried their babies to term, and over one-half of the babies born to such teenagers were born out of wedlock." 95 Stat. 578. Congress declared that "the Federal Government has a responsibility to help States develop adequate approaches to the serious and increasing problems of adolescent premarital sexual relations and pregnancy." S. Rep. 97-161, 97th Cong., 1st Sess. 4 (1981). The purposes of the Act are to help adolescents "within the context of the family," to "promote self discipline and other prudent approaches" to adolescent pregnancy, to "promote adoption as an alternative," to promote the delivery of care services, to encourage research and demonstration projects, to support "evaluative research," and, finally, to "encourage and provide for the dissemination of results" from the projects. 42 U.S.C. 300z(b).

The AFLA "authorizes appropriations for demonstration grants to individuals, public and nonprofit entities for services and research in the area of premarital adolescent sexual relations and pregnancy." S. Rep. 97-161, 97th Cong., 1st Sess. 1 (1981). Five categories of service are defined under the Act. "Necessary services" include 17 different services that, despite their name, "may be provided by grantees. . . ." 42 U.S.C. 300z-1(a)(4)(A)-(P).[2] "Core services" are "those services which shall be provided by a grantee." *Id.*, § 300z-1(a)(5).[3] "Supplemental services" are "those services which may be provided by a grantee." *Id.*, § 300z-1(a)(6). "Care services" are "necessary services for the provision of care" and "include[] all core services" for care prescribed by the Secretary. *Id.*, § 300z-1(a)(7). Finally, "preventive services" are "necessary services to prevent adolescent sexual relations." *Id.*, § 300z-1(a)(8).

No grants under the AFLA may be made for projects that provide abortion, abortion counseling, or abortion referral (unless such referral is requested by the adoles-

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[1] The AFLA replaced Title VI of the Health Services and Centers Amendments, Pub. L. No. 95-626, 92 Stat. 3551 (1978). Title VI was designed to "expand and improve the availability of, and access to, needed comprehensive community services" (*id.*, § 601(b)(1)). Title VI identified two primary sets of services. "Core services," which "shall be provided by all grantees," included "pregnancy testing, maternity counseling, and referral services," "primary and preventive health services," "educational services in sexuality and family life (including sex education), and including family planning information" (*id.*, § 602(4)). "Supplemental services," which "may be provided" (*id.*, §§ 602(4), 602(5)), included child care, consumer education and homemaking, counseling for family members, and transportation. *Id.*, § 602(5). The Secretary was required to give priority to applicants who would use existing community services and involved "the community to be served, including public and private agencies, adolescents, and families, in the planning and implementing of the project." *Id.*, § 605(a)(7). Religious organizations were eligible, and in fact were awarded grants, under Title VI. S. Rep. 97-161, 97th Cong., 1st Sess. 15-16 (1981).

[2] These include: (A) pregnancy testing and maternity counseling, (B) adoption counseling and referral, (C) primary and preventive health services, including prenatal and postnatal care, (D) nutrition information and counseling, (E) referral for venereal disease, (F) referral for pediatric care, (G) educational services relating to premarital sex, (H) educational and vocational services, (I) referral to residential care, (J) mental and physical health services and referral, (K) child care, (L) consumer education, (M) counseling for family members, (N) transportation, (O) outreach services to families, (P) family planning services, (Q) other services that the Secretary approves by regulation. 42 U.S.C. 300z-1(a)(4).

[3] The AFLA does not expressly define the "core services" which "shall" be provided, but leaves these to be defined by regulation. 42 U.S.C. 300z-1(b).

cent and her parent or guardian),[4] and AFLA funds may not be used for the provision of family planning services (unless such services are otherwise unavailable in the community). 42 U.S.C. 300z-10(a); *id.*, § 300z-3(b)(1).

The AFLA requires each applicant for a grant to describe how it will involve in the program, "as appropriate in the provision of services, . . . religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives" 42 U.S.C. 300a-5(a)(21)(B). In practice, only 25% of the grantees have been religiously affiliated (Decl. of Jo Ann Gasper, May 12, 1987).

In the legislative history the authorizing committee stated that "the use of Adolescent Family Life Act funds to promote religion, or to teach the religious doctrines of a particular sect, is contrary to the intent of this legislation." S. Rep. 98-496, 98th Cong., 2d Sess. 10 (1984). To enforce this limitation on the use of funds, the Secretary attaches a proscription to the Notice of Grant Awards forbidding grantees to use AFLA funds to "teach or promote religion." U.S. J.S. App. 29a n.13. On at least one occasion, a religious organization was dropped from the program for violation of program restrictions (Decl. of Jo Ann Gasper, Oct. 21, 1985).

In initiating the AFLA program in 1981 and in reauthorizing it in 1984, Congress considered possible conflicts with the Establishment Clause and concluded that the program comported with constitutional standards. S. Rep. No. 97-161, 97th Cong., 1st Sess. 15-16 (1981); S. Rep. 98-496, 98th Cong., 2d Sess. 9-10 (1984). "Religious affiliation is not a criterion for selection as a grantee under the adolescent family life program, but any such grants made by the Secretary would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents." S. Rep. 97-161, at 15-16.

[4] This section "consolidated and clarified" the prohibition on "abortion related activities under prior law." H. Conf. Rep. No. 97-208, 97th Cong., 1st Sess. (1981), *reprinted in* [1981] U.S. Code Cong. & Admin. News 1010, 1178-79.

2. Appellees Chan Kendrick, *et al.* (hereafter "plaintiffs-appellees"), filed this action on October 27, 1983, pursuant to 28 U.S.C. 1331, contending that the AFLA is unconstitutional in its entirety because it violates the Establishment Clause of the First Amendment. Appellees filed an amended complaint on December 29, 1983, challenging the constitutionality of only the care and prevention services (U.S. J.S. App. 5a).

Appellant United Families of America ("UFA") is an organization with members who are parents of minor children eligible for services provided under the AFLA. The district court's order diminishes the range, diversity, and effectiveness of programs available to UFA's members. Memorandum in Support of Motion to Intervene (filed Oct. 2, 1984). UFA intervened in the district court and participated as a defendant-intervenor in support of the constitutionality of the AFLA. See App. A, *infra* (order granting UFA's motion to intervene).[5]

Finding "that the material facts are not in dispute and that summary judgment is appropriate" (U.S. J.S.

[5] Appellant's standing to intervene was based on the status of their members as beneficiaries and potential beneficiaries of the program. Cf. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 132-36 (1967) (users of natural gas had protectable interest justifying intervention of right in antitrust action by Justice Department against natural gas pipeline corporation, since they would be adversely affected by any outcome of the suit that tends to reduce competition); *Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (parents of public school children have requisite interest to intervene as of right as defendants-appellants in desegregation suit brought by other parents against the school board). See Memorandum in Support of Motion to Intervene (filed Oct. 2, 1984).

App. 7a-8a), the district court held that the AFLA was unconstitutional on its face and as applied "*insofar as it involves religious organizations in carrying out the purposes of the Act*" and declared that "*the involvement of religious organizations as AFLA grantees or subgrantees is unconstitutional*" (U.S. J.S. App. 2a, n.2 (emphasis in original)).

The court found that the AFLA had a secular purpose (U.S. J.S. App. 17a-22a) but held that the statute on its face has a primary effect of advancing religion because "of its use of religious organizations for educating and counseling of teenagers on matters relating to religious doctrine" (U.S. J.S. App. 22a, 27a). Because the purpose of the AFLA included counseling and educating "about the harm of premarital sexual relations and the factors supporting a choice of adoption rather than abortion," and "these matters are fundamental elements of religious doctrine," the district court concluded that the AFLA had a "direct and immediate" effect of advancing religion. *Id.* at 28a. "[B]y contemplating the provision of aid to organizations affiliated with these religions—aid for the purpose of encouraging abstinence and adoption—the AFLA contemplates subsidizing a fundamental religious mission of those organizations." *Id.* at 30a.

Referring to several instances in which plaintiffs-appellees presented evidence that individual grantees had used curriculum with a religious derivation,[6] provided spiritual counseling, or provided services on premises that display religious symbols, the court also held that the AFLA is unconstitutional as applied. *Id.* at 32a-38a. The court did not, however, make findings that any more

[6] The district court noted that there was a factual dispute as to whether curriculum with "explicitly religious content" was taught in AFLA programs (U.S. J.S. App. 34a n.15). The court stated that there was no dispute that, in at least one instance, curriculum that was taught was "based on" religious materials. *Ibid.*

than a few of the grantees had been involved in these practices.

As a final basis for invalidation, the court held that the AFLA fostered an excessive entanglement between church and state. Because the religious organizations that were funded "have a religious character and purpose, the risk that AFLA funds will be used to transmit religious doctrine can be overcome only by government monitoring so continuous that it rises to the level of excessive entanglement" (U.S. J.S. App. 40a).

The court declined, however, to determine whether any of the religious organizations that were grantees were "pervasively sectarian" under this Court's definition,[7] although the court did state that the record showed that "the AFLA has in fact . . . funded 'pervasively sectarian' institutions. . . ." (U.S. J.S. App. 33a). The court reasoned that "where the connection to religion is not apparent on the face of the statute or from the nature of the government act itself," it was necessary to determine whether the organization was pervasively religious, but if the connection was clear on the face of the statute, then the court must only determine whether the statute "has the 'direct and immediate' effect of advancing religion" (U.S. J.S. App. 24a-25a).

After issuing the interlocutory order of April 15, 1987, the district court ordered further briefing on the issue of severability. On August 13, 1987, the court issued a final opinion and order, severing the term "religious organizations" from the AFLA and barring such organizations from participation in AFLA programs. The court stated that the "AFLA is fully and constitutionally operative as law in a manner consistent with the intent of Congress absent its references to 'religious organizations.'" U.S. J.S. App. 54a. The court also declined to clarify what it

[7] See, *e.g.*, *Grand Rapids School District* v. *Ball*, 473 U.S. 373, 384 & n.6 (1985); *Meek* v. *Pittenger*, 421 U.S. 349, 356 (1975); *Roemer* v. *Bd. of Public Works*, 426 U.S. 736, 755-59 (1976).

meant by the term "religious organizations," stating that there is "ample precedent in numerous statutes and federal regulations defining the term." *Id.* at 55a. The court also ordered the case dismissed from its docket. *Ibid.*

3. The Secretary has docketed two appeals in this case, one from the interlocutory order of April 15, 1987 (No. 87-253) and one from the final judgment (No. 87-431). Plaintiffs-appellees have docketed a conditional cross-appeal on the issue of severability (No. 87-462). On August 10, 1987, the Chief Justice granted the Secretary's motion for a stay pending appeal. 108 S. Ct. 1. On November 9, 1987, this Court noted probable jurisdiction in Nos. 87-431, 87-462.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This is the first case since *Bradfield* v. *Roberts*, 175 U.S. 291 (1899), in which this Court is asked to determine whether, and on what terms and conditions, religiously-affiliated organizations may participate in government-funded social welfare programs outside the area of elementary, secondary, and higher education. This case will affect hundreds of federal, state, and local programs in which religiously supported, inspired, or affiliated private groups are involved with the government in carrying out charitable social welfare activities.

The district court, disregarding *Bradfield* and the long-standing subsequent tradition of religious-governmental cooperation in the social welfare field, has adopted an extreme and unsettling construction of the Establishment Clause. According to the district court, governments may not involve religiously-affiliated organizations in any program that relates to their religious mission, even if the purpose of the program is entirely secular and the large majority of the participants are nonreligious. This holding cannot logically be confined to the relatively small AFLA program, since *every* field of social and charitable

work in which religious organizations are involved—from feeding the hungry and housing the homeless, to healing the sick and helping the alien—is understood by the religious organization as part of its religious mission.

Moreover, the district court has not confined its holding to organizations meeting this Court's definition of "pervasively sectarian," but has extended it to the wide range of voluntary organizations with a religious affiliation, inspiration, or connection, however slight. Nor did the court confine its holding to educational activities that might provide the occasion for religious indoctrination or instruction. Instead, it has ordered the exclusion of religious organizations from all aspects of the AFLA program, including pure "care services" indistinguishable from the many government-funded social welfare programs in which religious organizations now participate.

If not reversed, the district court's judgment thus threatens to disrupt the entire field of government-supported, privately-administered assistance for the poor, the sick, and the outcast. Moreover, the judgment is not required under this Court's interpretations of the Establishment Clause. On the contrary, the district court's holding would seriously reduce diversity and religious choice by forcing the secularization of all fields of charitable endeavor in which the government decides, for secular reasons, to supplement private efforts. The decision would also undermine the effectiveness of many programs by prohibiting the Secretary from making grants to the most qualified grantees, without regard to religious affiliation.

I. The Establishment Clause Permits The Involvement Of Religiously-Affiliated Organizations, Along With Other Private Voluntary And Charitable Associations, In Government-Supported Social Welfare Programs.

When the government enters a field of social welfare activity, it has two basic options. It may set up a governmental agency, which will compete with and perhaps

supersede prior private efforts. Or it may provide resources through grants, contracts, and cooperative agreements, to promote and extend private efforts. The latter alternative has many advantages: it can be accomplished without creating a new bureaucracy; it can take advantage of volunteers and infrastructure already in place; it can use private expertise; it allows a far greater diversity in manner of execution; and it can build upon established relationships of trust among the beneficiary population. Accordingly, grants to private organizations have become a favored instrument for furthering governmental social welfare objectives.

Prominent among private charitable institutions are those with a religious affiliation. The question in this case is how the government may support private social welfare activities without violating the Establishment Clause of the First Amendment.

The Establishment Clause has been interpreted as enshrining the principle of neutrality—government action must have an effect that "neither advances nor inhibits religion." *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971). In the context of governmental financial support for privately conducted social welfare activities, this command is subject to two conflicting interpretations, one followed by Congress and one adopted by the district court.

Congressional policy, reflected in the AFLA as well as countless other statutes, holds that grantees should be representative of the broad spectrum of private associations in the field. Significantly, this means that religious organizations may, and do, participate as grantees in a wide variety of publicly funded programs.[8] As the Senate

[8] *See generally* B. COUGHLIN, CHURCH AND STATE IN SOCIAL WELFARE (1965); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv.L.Rev. 513, 554-560 (1968); McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. Rev. 405, 420-24; Pickrell & Horwich, *"Religion as an Engine of Civil Policy": A Comment on the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field*, 44 Law & Contemp. Prob. 111, 113 n.16 (1981). Among the federal programs cited by these authors are: 29 U.S.C. 776(g) (1982) (rehabilitation for the handicapped); Hill-Burton Act of 1946, 42 U.S.C. 291 (1982) (hospital construction); 42 U.S.C. 622 (1982) (child welfare services); 42 U.S.C. 630-644 (1976) (Work Incentive Program); 42 U.S.C. 1397a (1976) (Title XX Social Security Act Day Care Services); 42 U.S.C. 2931-2932 (1982) (Head Start); P.L. No. 93-288, 88 Stat. 143 (1974) (disaster relief); P.L. No. 90-445, 82 Stat. 462 (1968) (juvenile delinquency); 42 U.S.C. 3027(a)(14)(A) (multi-purpose senior centers); P.L. No. 90-248, 81 Stat. 821 (1968) (maternal and child services); P.L. No. 87-70, 75 Stat. 149 (1961); P.L. No. 86-372, 73 Stat. 654 (1959) (housing); Economic Opportunity Act of 1949, P.L. No. 88-452, 78 Stat. 508 (1964), 42 U.S.C. 2781-2831 (1964); Peace Corp Act of 1961, P.L. No. 87-293, 78 Stat. 612 (1961); Agricultural Act of 1949, ch. 792, 63 Stat. 1051 (1949). Many more programs at the state and local level involve religious organizations.

Labor and Human Resources Committee stated in authorizing the AFLA:

> Charitable organizations with religious affiliations historically have provided social services with the support of communities and without controversy.

S. Rep. No. 98-496, 98th Cong., 2d Sess. 10 (1984). These arrangements have been upheld by state and federal courts in a variety of contexts. See, *e.g.*, *Bradfield* v. *Roberts*, 175 U.S. 291 (1899); *Washington Health Care Facilities Authority* v. *Spellman*, 96 Wash. 2d 68, 633 P.2d 866 (1981); *Truitt* v. *Board of Public Works*, 243 Md. 375, 221 A.2d 370 (1966); *Craig* v. *Mercy Hospital—Street Memorial*, 209 Miss. 427, 45 So.2d 809 (1950); *Kentucky Building Comm.* v. *Effron*, 310 Ky. 355, 220 S.W. 2d 836 (1949) (care for the sick); *Wilder* v. *Sugarman*, 385 F. Supp. 1013 (S.D.N.Y. 1974) (three-judge court) (rejection of facial challenge), *modified*, 645 F. Supp. 1292, 1329-39 (1986) (settlement of as applied challenge); *Sargent* v. *Bd. of Education*, 177 N.Y. 317, 69 N.E. 722 (1904) (care for orphans); *Dunn* v. *Chicago Industrial School of Girls*, 280 Ill. 613, 117 N.E. 735

(1917) (care for neglected or delinquent adolescents); *Community Council* v. *Jordan*, 102 Ariz. 448, 432 P.2d 460 (1967); *Richter* v. *Mayor & Alderman*, 160 Ga. 178, 127 S.E. 739 (1925) (care for the poor).

The AFLA follows this longstanding practice. In enacting the AFLA, Congress expressly found that issues of adolescent sexuality and pregnancy are "best approached through a variety of integrated and essential services provided . . . by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives." 42 U.S.C. 300z (a)(8)(B). Religious organizations are neither favored nor disfavored by the AFLA; they are merely included among the wide array of private and governmental organizations that may be involved in the program.

By including religious participants, Congress both procures the services of the best qualified grant applicants, without regard to religion, and gives families a broader range of choice in the style and philosophy of service agencies. As the Senate Report states: "Religious affiliation is not a criterion for selection as a grantee under the adolescent family life program, but any such grants made by the Secretary would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents." S. Rep. 97-161, at 15-16. The record shows that only 25% of the grantees in the AFLA program are religiously affiliated. Decl. of Jo Ann Gasper (May 12, 1987). This demonstrates that the program has not been administered in a way that favors religious over nonreligious participants.

The district court, on the other hand, held that religious organizations must be barred from publicly funded programs if those programs relate to their "religious mission" (U.S. J.S. App. 30a). The effect of this approach is to favor nonreligious organizations over religious, to create incentives for religiously-affiliated organizations to

drop their affiliations, and to deny beneficiaries of the program the option of receiving the services from providers affiliated with religion. Far from being neutral, this approach uses the fiscal muscle of the federal government to crowd out non-secular alternatives from all social welfare fields the government chooses to assist. To exclude an otherwise eligible organization from participation in a government program, merely because of its religious affiliation, raises serious constitutional questions under the Free Exercise and Equal Protection Clauses. *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *cf. McDaniel* v. *Paty*, 435 U.S. 618, 626-29 (1978).

This Court has never held that religious organizations must be excluded from publicly-supported social welfare programs. On the contrary, in the case most directly on point, *Bradfield* v. *Roberts*, 175 U.S. 291 (1899), this Court upheld a grant of $30,000 by Congress to a hospital, even though the hospital was "conducted under the auspices of the Roman Catholic Church," which "exercise[d] great and perhaps controlling influence over the management of the hospital." *Id.* at 298. More recently, Justice Blackmun, writing for a plurality in *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976), stated the point succinctly. "It has long been established," he wrote, "that the State may send a cleric, indeed, even a clerical order, to perform a wholly secular task." *Id.* at 746. See also *Wolman* v. *Walter*, 433 U.S. 229, 259 (1977) (Marshall, J., concurring in part); *id.* at 266 (Stevens, J., concurring in part); *Lemon* v. *Kurtzman*, 403 U.S. at 644 (Douglas, J., concurring in part).

The key factor under this Court's cases is that "the benefit of government programs and policies [must be] generally available, on the basis of some secular criterion, to a wide class of similarly situated nonreligious beneficiaries." *Marsh* v. *Chambers*, 463 U.S. 783, 809 (1983)

(Brennan, J., dissenting). See *Witters* v. *Department of Services*, 106 S. Ct. 748 (1986); *Mueller* v. *Allen*, 463 U.S. 388 (1983); *Roemer* v. *Board of Public Works*, 426 U.S. at 746; *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Walz* v. *Tax Commission*, 397 U.S. 664 (1970). Under the AFLA, grants are available to a wide array of groups, most of which are wholly secular. The effect of the program is neither to encourage nor discourage religious (as compared to nonreligious) efforts in this area, but simply to support a diverse group of service providers, of varying viewpoints and motivations.

For its contrary conclusion, the district court relied almost exclusively on cases involving aid to parochial schools. In these cases, the vast preponderance of aid goes (and is specifically tailored to go) to religious institutions. See *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 782 n.38, 794 (1973); *Sloan* v. *Lemon*, 413 U.S. 825, 830 (1973); *Grand Rapids School District* v. *Ball*, 473 U.S. 373, 384 (1985); *Aguilar* v. *Felton*, 473 U.S. 402, 406 (1985).[9] These cases are easily distinguishable from the instant case, where only a small part of the aid goes to religious organizations. Cf. *Witters*, 106 S. Ct. at 752; *Walz* v. *Tax Commission*, 397 U.S. at 689 (Brennan, J., concurring).

The district court obliquely acknowledged the legitimacy of religious participation in social welfare programs in a footnote (U.S. J.S. App. 22a n.12), but purported to distinguish the AFLA on the ground that it is "related to religious doctrine" (*id.* at 27a). See *id.* at 30a:

> It is a fundamental tenet of many religions that premarital sex and abortion are wrong, even sinful.

[9] This point is perhaps clearest in *Mueller* v. *Allen*, 463 U.S. 388 (1983), where the crux of the dissenters' argument was that the tax benefits for educational expenditures would flow predominantly to sectarian schooling. *Id.* at 408-411 (Marshall, J., dissenting).

> . . . The AFLA does not prohibit these religions from receiving AFLA grants. Thus, by contemplating the provision of aid to organizations affiliated with these religions—aid for the purpose of encouraging abstinence and adoption—the AFLA contemplates subsidizing a fundamental religious mission of those organizations.

This argument proves too much. Virtually every activity conducted by religious organizations is related to their "religious mission" and grows out of a commitment to their "religious doctrine." There is nothing uniquely "religious" about issues of sex and pregnancy; the Bible talks as often about caring for the poor, the widow, the orphan, and the alien as it does about sex. Religious organizations should not be barred from programs to feed and house the poor—or deal with the problem of adolescent pregnancy—merely because they advance religious objectives at the same time that they achieve the government's secular purposes.[10]

The district court correctly concluded that the purpose of the AFLA—to discourage teenage pregnancy, to promote adoption as an alternative to abortion, and to care for pregnant adolescents—is a legitimate secular objective. U.S. J.S. App. 17a-22a. That this may coincide, or harmonize, with the tenets of some religions is irrelevant

[10] The district court's reasoning is the mirror image of the district court's reasoning reversed by this Court in *Corporation of Presiding Bishop* v. *Amos*, 107 S.Ct. 2862 (1987). In *Amos*, the district court treated the social welfare activities of a church as too "secular" to warrant a free exercise legislative accommodation. Here, the district court has treated social welfare activities as too "religious" to receive support under the Establishment Clause. The better view is that social welfare activities of churches are "religious" for purposes of free exercise protection but "secular" for purposes of the Establishment Clause. Cf. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14-6, at 828 (1978) (emphasis in original) ("[A]ll that is *'arguably religious'* should be considered religious in a free exercise analysis. . . . [A]nything *'arguably non-religious'* should not be considered religious in applying the establishment clause.")

for Establishment Clause purposes. *Harris* v. *McRae*, 448 U.S. 297, 319 (1980); *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961). The district court's "religious mission" standard is tantamount to excluding all religious organizations from social welfare programs.

II. The District Court Erred In Excluding From Participation In The AFLA All Religiously-Affiliated Organizations, Including Organizations That Are Not "Pervasively Sectarian."

Even assuming arguendo that participation by some religiously-affiliated organizations in the AFLA is unconstitutional, the district court's order is overbroad, for it excludes not only organizations that are "pervasively sectarian," but all organizations with the slightest religious affiliation. This Court has carefully distinguished between "pervasively sectarian" organizations, in which religious and other activities are "inextricably intertwined" (*Lemon* v. *Kurtzman*, 403 U.S. at 657) and other religious organizations, which are "not 'so permeated by religion that the secular side cannot be separated from the sectarian.'" *Roemer* v. *Board of Public Works*, 426 U.S. at 759. *Compare Meek* v. *Pittenger*, 421 U.S. 349, 356 (1975), *with Roemer* v. *Board of Public Works*, 426 U.S. at 755-59; *Tilton* v. *Richardson*, 403 U.S. at 686-87. The description of the religious colleges in *Roemer*, for instance, demonstrates that an organization may have a substantial religious component to its activities without becoming "pervasively sectarian" under this Court's definition.[11]

[11] The colleges in *Roemer* were formally affiliated with the Roman Catholic Church, with the Church officially represented on their governing boards; they employed Roman Catholic chaplains, held religious services, and "encourage[d] . . . spiritual development"; they required religion and theology courses for their students; they opened some—in one case a majority—of their classes with prayer; some of their classrooms contained religious symbols and some instructors wore clerical garb. 426 U.S. at 755-56. Nonetheless, the Court held that these colleges were not "pervasively sectarian" and could receive public aid.

The identification of "pervasively sectarian" institutions is of great practical importance under this Court's decisions. When a recipient of public aid is found to be "pervasively sectarian," the aid has been eliminated, for it is not possible to segregate religious from secular activities within the organization. On the other hand, organizations that are religious, but not "pervasively sectarian," are eligible for participation in publicly-funded programs on an equal basis with secular institutions, on the condition that they refrain from using the funds for "specifically religious activity." *Hunt* v. *McNair*, 413 U.S. 734, 745 (1973); *Roemer*, 426 U.S. at 759. Indeed, the Court will "assume that [such organizations] will exercise their delegated control over use of the funds in compliance with the . . . constitutional mandate." *Id.* at 760. This eliminates the need for excessively entangling surveillance of the organizations' use of the funds. *Id.* at 762.

In this case, the district court declined to determine which, if any, of the AFLA grantees are "pervasively sectarian."[12] Instead, the court defined as "religious" any organization with a religious affiliation, however tenuous. The court ordered the Secretary to exclude from the program any organization that has "explicit corporate ties to a particular religious faith and bylaws or policies that prohibit any deviation from religious doctrine," as well as organizations, even "without discernable [*sic*] religious ties," that were "inspired" by religious writings or precepts. U.S. J.S. App. 35a. In its final order denying the government's Rule 59(e) motion, the court identified its use of the term "religious organization" with the "numerous statutes and federal regulations defining the term." *Id.* at 55a.

[12] Without explanation, the court did, however, assert that "the inescapable conclusion is that federal funds have been used by pervasively sectarian institutions to teach matters inherently tied to religion." U.S. J.S. App. 36a.

Among the grantees threatened with debarment under the district court's order are several religiously-affiliated hospitals, YWCA programs in various cities, Catholic Charities facilities, maternity homes, Emory University, Covenant House of New York, and several formally secular organizations, including Family of the Americas and Search Institute.

This broadly sweeping prohibition goes well beyond anything sanctioned by this Court. While there has been no opportunity for proof, it seems probable that many of the AFLA grantees that are cut off under the district court's order are not "pervasively sectarian" and should be retained in the program. If not reversed, this aspect of the district court's order will cause serious injury not just to the AFLA, but to many other social welfare programs.

III. The District Court Erred In Excluding Religiously-Affiliated Organizations From Providing Non-Educational Care Services Under The Act.

A wide variety of services are provided by grantees under the AFLA. Some projects are designed to rescue and rehabilitate adolescents who have been entrapped by drugs and prostitution;[13] many more provide homes for unwed adolescent mothers with attendant medical and nutritional care;[14] others provide pregnancy testing and related health services;[15] others assist with adop-

[13] See, *e.g.*, Aff. of Rev. Bruce Ritter (Apr. 23, 1987) (Covenant House of New York).

[14] See, *e.g.*, Decl. of Jo Ann Gasper, Tab B (Oct. 21, 1985) (Salvation Army Maternity Home of Tulsa, Oklahoma); Def's Statement of Material Facts, Vol. I (St. Ann's Infant & Maternity Hospital of Maryland).

[15] See, *e.g.*, Def's Statement of Material Facts, Vol. IV (St. Paul-Ramsey Medical Center of Minnesota); Aff. of Carol A. Bervera (filed May 22, 1987) (Brightside for Children and Families, Our Lady of Providence Children's Center of West Springfield, Mass.).

tions.[16] These services are not different in character from social welfare services provided routinely, without controversy, by religious and nonreligious grantees under other federal, state, and local programs. See pages 12-14 & n.8, *supra*.

The district court, however, failed to draw any distinction between the various services provided under the Act. Although the court's opinion discusses only projects involving sex education and counseling (U.S. J.S. App. 27a-32a), the order extends to the Act in its entirety. Even assuming arguendo that the district court is correct in its evaluation of the constitutionality of AFLA's sex education and counseling programs, the order cannot be supported as it applies to other health and welfare services. If not reversed, the district court's decision could create a precedent for exclusion of religious organizations from many activities in which they make a significant contribution to public welfare.

[16] See, *e.g.*, Def's Statement of Material Facts, Vol. I (Adoption Systems of WACAP, of Washington State).

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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November 10, 1987

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK, *et al.*,
Plaintiffs,

v.

MARGARET HECKLER,
Defendant.

[Filed Nov. 26, 1984]

ORDER

Before the Court is the motion of Sammie J. Bradley, Katherine R. Warner and the United Families of America ("UFA"), to intervene in this action under Fed. R. Civ. P. 24(a) or 24(b). Upon consideration of this motion, as well as the memoranda in support thereof and in opposition thereto, the Court hereby allows the movants to intervene under the permissive intervention provision of Fed. R. Civ. P. 24(b).

Initially, the Court find the application to be timely filed. As this Circuit has consistently held, "'[w]hether a motion to intervene is timely made is 'to be determined from all the circumstances, including the purpose for which the intervention is sought . . . and the improbability of prejudice to those already in the case.'" *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981), citing, *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 907 (D.C. Cir. 1977). In this case, based upon the representation of counsel for the movants that the intervenors will conduct no additional discovery and will

abide by the briefing schedule as it pertains to the defendants, there will be no prejudice to either side. Plaintiff's argument that intervention will result in delay due to the potential for two cross-examinations of each witness is without merit. If this were a ground to deny intervention, then all intervenor motions would be unsuccessful.

Second, the Court finds that the intervenors raise common questions of law and fact with the present case. The intervenors seek to have the Adolescent Family Life Act ("AFLA") programs upheld because these programs present an alternative to Title X which the intervenors find to be more in keeping with the tenets of their religious beliefs. Therefore, it is at least arguable that they have an interest in the outcome of this litigation, and in the constitutionality of the AFLA programs.

Third, the Court's ability to allow a permissive intervention is wholly discretionary once the two requirements above have been satisfied. *Hodgson v. United Mine Workers of America*, 473 F.2d 118 (D.C. Cir. 1972). The Court, in the exercise of this discretion, feels that the issues raised by the intervenor are related to this action and ought to be heard.

Therefore, it is by the Court this 21 day of November, 1984, hereby

ORDERED that the motion to intervene be granted, based on the representations of intervenors' counsel that there will be no further discovery and that the intervenors will respond to plaintiffs' motion for summary judgment no later than November 27, 1984 and file their own dispositive motion no later than December 3, 1984.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK, *et al.*,
Plaintiffs,
v.

DR. OTIS R. BOWEN, JR., Secretary of the Department of Health and Human Services,
Defendant,
and

SAMMIE J. BRADLEY, KATHERINE K. WARNER and UNITED FAMILIES OF AMERICA,
Defendant-Intervenors.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given this 11th day of September, 1987, that Defendant-Intervenor, UNITED FAMILIES OF AMERICA, hereby appeals to the Supreme Court of the United States from the final order of the District Court entered August 13, 1987 in this action in favor of Plaintiffs.

This appeal is taken pursuant to 28 U.S.C. Sec. 1252.

Respectfully submitted,

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